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JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 57.

JOVITE CAU,

Plaintiff in Error,

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR IN REPLY.

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The brief of the plaintiff in error contains a variety of authorities whose application, and a number of suggestions whose pertinence to, the issues presented, we dispute; and we ask leave to file the following memorandum in reply.

I.

A number of cases are cited from the courts of Texas, Minnesota, Arkansas, Missouri and Tennessee in support of the proposition that the fire clauses in the bills of lading sued on are void for want of consideration. An examination of those cases will show that they fall into two distinct classes. The first class of cases does not deal with or at all decide the point raised. They decide that, under certain circumstances, it will be held that a fair opportunity to

choose between a contract for limited liability and the legal or unlimited liability of the carrier has not been afforded the shipper; that in the absence of such an opportunity being afforded, the contract will be regarded as extorted by duress; and that being so extorted, the exemptions from liability will not be enforced.

To this class belong the cases cited of:

Atchison Ry. Co. vs. Dill, 55 Am. and Eng. R. R. Cas. 376 (Kansas Sup. Ct.)

Louisville, etc., R. R. Co. vs. Sower, 49 Am. and Eng. R. R. Cas. 166 (Sup. Ct. of Tennessee).

Little Rock, etc., R. R. Co. vs. Craven, 55 Am. and Eng. R. R. Cas. 650 (Sup. Ct. of Arkansas).

St. Louis, etc., R. R. Co. vs. Spann, 20 S. W. Rep. 914 (57 Arkansas, 127).

Lewis vs. Great W. R. R. Co., 3 Q. B. Div. 195; 47 L. J. Q. B. Div. 131.

Carr vs. Lancashire, etc., R. R. Co., 21 L. J. Exch. 261; 7 Exch. 707.

We do not believe that any of the American cases were correctly decided on the facts presented; but in any event, *neither they nor the English cases have any application here for the reason that no unfairness in obtaining the contracts on the part of the carrier was averred or proved,* and the issue is, therefore, wholly extraneous to this case, and outside of the record.

The second class of cases do deal with the question of consideration and lend some color to the contention of the plaintiff in error.

We submit, however, that they are in essential conflict with the decisions of this Court; that they are unsound in principle; and more than that, that they are in the language of a dissenting judge in one of them "violative of elementary principles of law and morals." (Folkes, J. in

R. R. Co. vs. Gilbert, 42 Am. and Eng. R. R. Cas. 388). We think these points can be briefly demonstrated.

In the case of Wehrman cited (61 Am. and Eng. R. R. Cas. 273), the suit was for loss of goods shipped under a bill of lading exempting the carrier for loss after arrival of the goods at its warehouse. It appeared that the shipment was made at the regular published tariff rate. No evidence was introduced to show what would have been a reasonable charge or what was deemed a reasonable charge for carriage under the legal, instead of the contractual or limited liability. The Court held:

1. That the obligation to receive and transport was no consideration for the exemption, since the same obligation lay upon the carrier at common law.

2. That the Interstate Commerce Act forbade any abatement of, or from, the regular tariff rates; and that as the tariff in question made no mention of any limitation of liability, no abatement could be inferred and hence there was no consideration for the exemption, and it was void.

The first point ruled in this case is in direct conflict with the decision of this Court in the case of *York Company vs. Central Railroad Company, 3 Wallace, 113*, where it was held that "the consideration expressed was sufficient to support the entire contract;" such expressed consideration being the undertaking to carry.

The second point ruled proceeds upon an unwarranted assumption of an unproved fact, namely—that the regular tariff rate charged for the shipment was based upon the unlimited liability imposed by law; and the bill of lading containing the same rate, it was assumed that no concession in rate had been made. In making the assumption that the regular tariff was based upon the carrier's unlimited or legal liability, the Court not only ignored the com-

mon knowledge of the world that no man nowadays ships on the old common law liability of the carrier; and that all rates are made and based upon special contracts; but it ignored two elementary principles of law, namely, that

> "Every presumption is in favor of the legality of a transaction and it is for the party alleging its illegality to show everything necessary to render it so, though the proof be of a negative character." Merrill vs. Melchior, 1 George (Miss.), 516.
>
> See also Gelpke vs. City of Dubuque, 1 Wallace, 175.

This Court in the York case sanctions this rule by holding in effect that a consideration will be presumed.

This criticism of Wehrman's case applies in every particular to the cited cases of Kellerman, 34 S. W. Rep. 41 (Missouri, 1896), and Barnett, 34 S. W. Rep. 139 (Texas, 1896).

The case of Gilbert cited (42 Am. & Eng. R. R. Cases, 372), was one to recover the value of cotton shipped under a bill of lading containg a fire clause and destroyed by fire. This bill the plaintiff accepted and shipped under without the slightest objection, having accepted and used similar bills for a period of nine years. Three years after the loss he brought suit, alleging: (*a*) that he had not had "an opportunity of exercising the option" of accepting a limited or unlimited liability bill of lading; and (*b*) that he received no consideration for the limitation. It was shown, without dispute, that the agent receiving the cotton for shipment had no authority to give any rate, except that given to and accepted by the shipper, but that he could have secured immediate authority by telegraph to give a rate based upon the unlimited or legal liability of the carrier. The Court, nevertheless, held that the absence of such an authority was a want of that "readiness" to carry under its common

law liability which it is said the law demanded of the carrier; and held the bill extorted by duress, although there was no occasion for haste in the shipment, and though it did not appear that the time required for obtaining authority would have at all delayed the transportation of the cotton.

On the question of consideration, the Court found that *the rate charged in the bill of lading was the same as that charged before the insertion of the fire clause in such bill.* From this fact it concluded that no reduction was made on account of the introduction of the fire clause, and therefore held such clause to be without consideration and void. In respect of this case, we submit:

1. That it conflicts with the *York* case in this Court, since the expressed consideration was sufficient to support the entire contract.

2. That the case at bar is distinguished from it by the lack of any evidence to show that the rate prior to the insertion of the fire clause was the same as the bill of lading rate.

3. That the language of the dissenting Judge laid down a correct principle of law, which was applicable to the case and is applicable to, and should be enforced in this case, namely:

> "The shipper is charged with knowledge of the law that authorized him to demand a common law liability of the carrier, and his acceptance in silence of the bill of lading with the 'fire clause,' is a waiver of such demand or rate in the absence of fraud, where it appears there was a difference in the freight charges for a limited and unlimited liability. When, therefore, we have to deal with a litigation against loss by fire, without fault or negligence on the part of the carrier, there is no reason why the same general principle, appli-

cable to knowledge and estoppel between individuals other than carriers, should not be applied."

See Hutchison Carriers, Secs. 238, 240.

We submit, therefore, that the foregoing decisions are not in point; that they are in conflict with the decisions of this Court; and finally, that to permit a shipper to repudiate his own deliberate contract is to sanction "a most dangerous and perplexing innovation" (Folkes, J. dissenting in Gilbert's case, *supra*) in the law of carriers to say nothing of the law of morals.

II.

On pages 19, 20 and 21 of the opposing brief, the point is made that the bills of lading sued on do not constitute agreements at all, but are simple notices of a limitation of liability; and it is urged that the common law liability of the carrier cannot be gotten rid of by such notice or anything short of expressed contracts.

We presume this contention is based upon the fact that the bills of lading are not signed by the shipper. As to this it may be remarked that not one bill in a thousand ever is signed by the shipper, and that such signature has been held not necessary to establish his assent to the terms of the bill.

Piedmont Co. vs. Columbia R. R. Co., 16 Amer. & Eng. R. R. Cas., 194 (19 S. C. 353).

Adams Express Co. vs. Haynes, 42 Ill. 89.

Cincinnati R. R. Co. vs. Pontius, 19 Ohio St. 221.

Apart from this it appears that this shipper filled out these bills of lading himself, presented them for signature, and afterwards used them by attaching them to sight drafts. This conduct conclusively evidenced his assent to the terms of the bills and estopped him from claiming that he did not assent to such terms.

Furthermore, said bills contain the following provisions, namely:

> "That the acceptance of the bill of lading shall be deemed conclusive proof of the assent of the shipper to all the terms and conditions written or printed herein." (Tr. p. 23).

The plaintiff in error is still further concluded by his pleadings from urging the point made. After setting out the delivery and acceptance of cotton for carriage, he avers that:

> " * * * *In evidence of said contract* the said company then and there delivered its said bills of lading."

In the case of Washburn-Crosby Co. vs. Boston, etc. R. R. Co., 180 Mass. 252, goods shipped were lost by fire. The bill of lading contained a fire clause. This clause was attacked as invalid, as the plaintiff in error does here. The Court through his Honor, Mr. Justice Holmes, stated and disposed of the contention as follows:

> "With regard to the validity of the bills of lading, the fact is relied on that when the goods first were shipped, the sealer of the railroad receiving them gave a receipt simply acknowledging that the railroad had received the flour, and that the bills of lading were issued subsequently upon surrender of the receipt. It is argued that the provisions of the bills of lading are an attempt to cut down the liability already assumed, and by the law of Minnesota are without consideration and void. There are so many answers to this contention that it seems hardly worth while to state any. In the first place, the *plaintiff declares on the bill of lading, so that it is rather late now to say that it is void.*"

It is plain that a perfectly binding express contract was entered into and we submit that the shipper should not be permitted to question it after such conduct and such pleading.

III.

The plaintiff in error (brief, pages 22-23) cites six Louisiana cases to sustain the proposition that, where loss occurs by an excepted cause, the burden of proof is on the carrier to show no negligence. Five of these cases were decided by an inferior appellate court in the City of New Orleans known as the Court of Appeals for the Parish of Orleans. Its decisions customarily repose in the quiet dust of the Clerk's Office to which they are confided by the Legislature which makes no provision for their publication. They are not authority in Louisiana or elsewhere.

But one case is cited from the Supreme Court of Louisiana and this case does not sustain the contention advanced. On the contrary, the decisions of that tribunal cited in our original brief are fully in accord and explicitly follow the decisions of this Court in imposing the burden of proof on the shipper, when the loss is shown to have happened by a cause excepted against.

In any event the rule is a mere rule of evidence, and it is elementary that the Federal Courts will lay down and enforce their own rules in this branch of the law.

For the reasons given in our original brief and for those urged above, we again respectfully submit that the judgment brought here should ~~have been~~ be affirmed.

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